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No. 614

In the Supreme Court of the United States

OCTOBER TERM, 1961

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS, NATIONAL MEDIATION BOARD, O'NEILL, EDWARDS AND BOYD IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 4a)[1] is reported at 294 F. 2d 910.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1961 (Pet. App. 3a). A timely petition for rehearing was denied by the court *en banc* on Sep-

[1] "Pet. App." references are to the appendix to the petition for a writ of certiorari. "R" references are to the joint appendix in the court of appeals, which has been filed in this Court as part of the record.

tember 20, 1961. The petition for a writ of certiorari was filed on December 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether both courts below correctly held that the National Mediation Board's finding that the Air Line Pilots Association was eligible to appear on the ballot for election as the authorized representative of the craft or class of stewards and stewardesses was not subject to judicial review.

2. Whether the National Mediation Board was required to hold a hearing in connection with its determination that the Air Line Pilots Association, if chosen by a majority of the stewards and stewardesses employed by Braniff and United Air Lines, was eligible to represent those stewards and stewardesses.

STATUTE INVOLVED

Railway Labor Act, Section 2, Third, Fourth and Ninth, 45 U.S.C. 152:

> § 152. General Duties.
>
> * * * * *
>
> Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by

interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * *.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the in-

dividuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT

The present litigation stems from a dispute between two unions contending for the right to represent the craft or class of stewards and stewardesses of Braniff and United Air Lines.

1. *Proceedings Before the National Mediation Board.* On January 12, 1961, the Air Line Pilots

Association (ALPA) filed an application with the National Mediation Board "for investigation of a representation dispute, under Section 2, Ninth of the Railway Labor Act" among stewardesses employed by Braniff Airways (R. 13, 311). The application revealed that over 84% of these employees had signed valid authorization cards for ALPA (R. 311–313), although at the time their designated representative was the Air Line Stewards and Stewardesses Association (ALSSA), petitioner herein (R. 13). On January 20, 1961, ALPA filed a similar application with respect to the stewards and stewardesses employed by United Air Lines (R. 14, 315–316) who were also represented by ALSSA. Eighty percent of these employees had furnished ALPA with valid authorization cards (R. 316).

On January 25, 1961, the Board notified the carriers and petitioner union of the filing of the applications and "invited [the president of petitioner union] to submit any statement he may care to make with respect to [each] application" (R. 13–14; see 311, 316). ALSSA responded by objecting to the "standing [of ALPA] to appear on an election ballot involving a representation dispute among the craft or class of stewards and stewardesses * * *" (R. 91; see R. 85–96). It stated, as grounds for its objection, that ALPA is composed of persons who stand in the relation of the carrier, its agents, supervisors and management to the stewards and stewardesses and that it would violate the Railway Labor Act, particularly Section 2, Third and Fourth, for that Association to represent the craft or class of stewards and steward-

esses. ALSSA requested a formal hearing before the Board at which time it would "introduce evidence on the foregoing and other relevant matters" (R. 90, 96).

At an executive meeting on February 7, 1961, the full membership of the Board considered petitioner's contentions with respect to the eligibility of ALPA to represent stewards and stewardesses as well as its request for a hearing (R. 97, 99). By letters dated February 9 and 10, 1961, the Board informed petitioner that in accordance with Section 2, Ninth, of the Railway Labor Act a preliminary investigation of the representation dispute had been made, that ALPA was not barred from representing the stewards and stewardesses of United and Braniff, and that ballot elections would be conducted (R. 97–100). With regard to ALPA's eligibility, the Board stated (R. 97–98):

> It will be noted there is no restriction contained in the language of the Act on who may be certified as the representative of the employees of a carrier subject to the Act. However, the Board for many years has had a policy of not certifying a carrier or an officer of a carrier as an employee representative for the purposes of the Act. The Board is of the opinion that the Air Line Pilots Association is not barred, under such policy, from making application for investigation of a representation dispute involving the employees in question. The Board must, therefore, decline your request for a formal hearing on this subject.

Subsequently the Board conducted secret ballot elections in which eligible stewards and stewardesses of each air line voted as a separate craft or class whether ALSSA, ALPA, or some other organization or indi-

vidual should represent them. The official count of ballots in the Braniff election showed 8 votes for ALSSA and 214 for ALPA (R. 351). In the United election, 891 stewards and stewardesses voted for ALPA, 178 for ALSSA (R. 351). Thereafter the Board certified ALPA as the representative of stewards and stewardesses at Braniff (R. 351) and at United.

2. *Proceedings in the Courts Below.* Prior to the completion of the elections and certifications, petitioner on February 20, 1961, filed a complaint for an injunction and declaratory relief in the District Court for the District of Columbia, against the Board, its members, ALPA, United and Braniff (R. 1). The complaint asserted that the Board had exceeded its jurisdiction under the Railway Labor Act in holding that ALPA was eligible for election as representative of the craft or class of stewards and stewardesses and, further, that the Board's refusal to afford petitioner union a hearing in advance of its action was a denial of due process (R. 8). In addition, the complaint also alleged that both United and Braniff, acting through their pilots and in collusion with ALPA, had restrained, coerced and interfered with the stewards' and stewardesses' right to self-organization by attempting to induce them to join ALPA (R. 9).

On February 28, 1961, the Board and its individual members moved to dismiss the complaint or, in the alternative, for summary judgment on grounds, *inter alia,* that the district court had no jurisdiction to review the Board's determination under the decision in *Switchmen's Union* v. *National Mediation Board,* 320

U.S. 297 (R. 321). Affidavits attached to the government's motion set forth the administrative background, procedures and actions in the two representation disputes, as outlined above (R. 311–317).

On May 5, 1961, the district court granted the government's motion for summary judgment on the ground that it was "without jurisdiction over the subject matter" in "light of the decision in *Switchmen's Union* * * *" (R. 352). At the same time it granted motions, filed by United and ALPA, to dismiss (R. 352–353).

On July 13, 1961, the court of appeals affirmed *per curiam*, stating (Pet. App. 5a):

> Here, the Board recognized the stewards and stewardesses of United Airlines as a craft or class. It made a like ruling as to similar employees of Braniff Airlines. Each group voted in elections in which no other group participated. What is complained of is that the Board allowed the Air Line Pilots Association (ALPA) to appear on the ballot. It won both elections. The plaintiff-appellant, the Air Line Stewards and Stewardesses Association, brought suit in the District Court, alleging that pilots perform some supervisory and managerial functions in regard to stewards and stewardesses, and hence that their union is ineligible to represent the persons whom they supervise. The short answer is that the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, does not forbid this, expressly or by implication. The District Court rightly dismissed the suit for lack of jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943).

With respect to the contention that the Board was required to grant a hearing, the court of appeals declared that the "Mediation Board—as distinguished from committees appointed by it—is not required to give a hearing to a protesting union. See *Switchmen's Union* * * *, *supra* at 304" (Pet. App. 5a).

ARGUMENT

This petitioner seeks review of the issue decided by this Court in 1943 in *Switchmen's Union* v. *National Mediation Board, supra*—whether the National Mediation Board's determinations in exercise of its mandatory power under Section 2, Ninth, of the Railway Act are subject to judicial review. As petitioner acknowledges (Pet. 12) and as recognized by the court of appeals (Pet. App. 5a), a similar issue was presented in two cases in which this Court denied petitions for certiorari on January 8, 1962, *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board*, No. 531, and *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board*, No. 540. In each of those cases the issue was reviewability of the Board's determination that flight deck crew members, including pilots and flight engineers, are members of the one craft or class eligible under Section 2, Ninth, to select a common representative for collective bargaining. Here, it is the reviewability of the determination that, contrary to petitioner's allegations, the Air Line Pilots Association is eligible to appear on the ballot for election as the authorized representative of the

craft or class of stewards and stewardesses.[2] The difference in the determinations made by the Board—a difference between who is eligible to vote in a representation election and what groups or individuals are eligible to appear on the ballot—does not change the issue as to which review is sought. It remains the availability or scope of judicial review. Thus, the government's brief in opposition filed December 1961 in No. 531 stated (p. 9):

> This Court, over eighteen years ago, in *Switchmen's Union* and two other cases decided the same day, made it perfectly clear that issues arising under Section 2, Ninth, of the Railway Labor Act—*including questions as to who is entitled to represent the craft,* who are members of it, or how the bargaining class generally is to be delineated—have been delegated by Congress to the NMB for settlement and are not reviewable in the courts. [Emphasis added.]

Under the circumstances, the factors set forth in our brief in No. 531 in support of the denial of certiorari are equally pertinent here and warrant similar action by this Court.

Petitioner here, as did the unsuccessful petitioners in the *UNA* and *WES Chapter* cases, cites *Leedom* v. *Kyne,* 358 U.S. 184, in an effort to avoid the holding

[2] In the *UNA* and *WES Chapter* cases the union complained because the Board's determination required engineers to vote with pilots in selecting a representative. Here the stewards and stewardesses voted as a separate craft or class and overwhelmingly chose ALPA, the pilots' union, as their representative (*supra,* p. 7). Petitioner's complaint is that ALPA should not have been permitted on the ballot.

in *Switchmen's Union*. However, *Leedom* v. *Kyne* is equally inappropriate as a precedent warranting judicial review and should be rejected for the reasons set forth in the government's brief in opposition in No. 531. In the instant case, the Board violated no statutory prohibition. Petitioner's assertion to the contrary rests on two contentions: that ALPA is composed of persons who stand in the relation of the carrier, its agents, supervisors and management to stewards and stewardesses and that the Railway Labor Act, particularly Section 2, Third and Fourth, bars such non-supervisory employees from selecting the Association as their representative (R. 5). Both contentions are without merit. Thus, the Board found as a fact that ALPA is not composed of persons who stand in the relation of the carrier or its officers to stewards and stewardesses (R. 97–100). In addition, both the Board and the court of appeals pointed out that the "Railway Labor Act, 45 U.S.C. § 151 *et seq.*, does not forbid * * * expressly or by implication" certification of a union composed of persons who "perform some supervisory and managerial functions in regard to stewards and stewardesses * * * to represent the persons whom they supervise" (Pet. App. 5a; see R. 97–100).[3]

[3] Since the employees here chose ALPA as their bargaining representative by decisive majorities, petitioner is in the position of attempting to nullify the expressed desire of the precise groups it seeks to represent. Rather than the Board's certification being in violation of the Act, it would seem to be peti-

The Board's determination that ALPA was eligible to represent these employees if elected by them is precisely the type of determination that Congress, as noted in *Switchmen's Union*, left to the Board's expert and expeditious judgment without judicial review. Just as it was necessary in that case for the Board in exercise of its power under Section 2, Ninth, to determine the composition of the bargaining unit before the election could be conducted, it was necessary here for it to determine the competency of ALPA to appear on the ballot. The filing of the application by ALPA put the Board on official notice of the existence of the representation dispute and compelled it to discharge its mandatory power under Section 2, Ninth, to investigate and settle the dispute. The Board's determination was made in exercise of its established powers under the statute and is immune from judicial review.

2. The judicial review issue presented by the instant petition does differ in one respect from that presented in the *UNA* and *WES Chapter* cases. Here, the Board denied the contentions of petitioner with respect to ALPA's eligibility after conducting an investigation during which petitioner was afforded a full opportunity to supply written materials in support of its position, but without holding a hearing. In both *UNA* and *WES Chapter* a committee appointed by the Board had held a hearing with respect to the

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tioner's position which is contrary to the policy expressed by Section 2, Fourth, that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * * (*supra*, p. 3).

allegations of the Flight Engineers' Association that pilots and flight engineers were members of different crafts. This distinction does not warrant a different result, however.

As recognized by the court of appeals, the statute does not require a hearing except where, as in the *UNA* and *WES Chapter* cases, the Board chooses to appoint a committee to make determinations in its place (Pet. App. 5a). In accordance with the statute, it has been the Board's long standing administrative practice to exercise its powers under Section 2, Ninth, after conducting an investigation, in the course of which all parties may submit written proofs but without holding a hearing. This practice has uniformly received judicial approval beginning with *Switchmen's Union, supra*, at 304, where this Court stated: "While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings." Appellant's argument to the contrary is, as found by the court below, "untenable" (Pet. App. 5a) and does not present an issue warranting review.

3. Wholly apart from the foregoing considerations, it is clear that petitioner's general assertion that stewards and stewardesses were subject to coercion by ALPA (R. 88, 94) did not require a hearing by the Board or create jurisdiction in the district court to set aside its determination. In its letters to the Board setting forth its objection to ALPA and requesting hearings (R. 85–96), petitioner failed to allege any details, incidents of coercion or any factual data whatsoever supporting its conclusory allegation. The

court of appeals, in affirming the Board's ruling, found these allegations "purely conclusory, and based largely if not wholly on the argument that pilots are part of management" (Pet. App. 6a). It pointed out that "If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution. See Railway Labor Act, Section 2, Tenth * * *" (*ibid.*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1962.

U.S. GOVERNMENT PRINTING OFFICE 1962